No. 75-1350

In the Supreme Court of the United States

OCTOBER TERM, 1975

GABRIEL SZEKELY, M.D., PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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This case, involving the Health Insurance for the Aged Act ("Medicare"), 42 U.S.C. 1395 *et seq.*, presents the same question now pending before this Court on petition for a writ of certiorari in *Mount Sinai Hospital of Greater Miami, Inc.* v. *Mathews*, No. 75-1041: whether the Secretary of Health, Education, and Welfare may recoup payments made to a medicare provider or other person for services subsequently determined to have been unnecessary and not covered by the Act.

Petitioner is a physician voluntarily participating in Part B of the medicare program.[1] In 1970 petitioner

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[1]42 U.S.C. (Supp. IV) 1395j-1395w. Pursuant to Part B, claims for payment may be submitted to the Secretary either by a beneficiary who receives covered services or by the physician who renders the services and who obtains an assignment of the claim for payment from the beneficiary. The other provisions of the Act are described in our brief in opposition to the petition for a writ of certiorari in *Mount Sinai Hospital, supra.* A copy of that brief is being furnished to petitioner's counsel.

received approximately $70,000 in medicare payments pursuant to assignments from patients. Subsequently, upon review of these assigned claims, the Secretary determined that petitioner had received payment for some services that were medically unnecessary and therefore not covered by the Act (42 U.S.C. 1395y) (Pet. Supp. App. 4a). The Secretary therefore suspended current payments due petitioner in order to recoup the payments for these services.

Petitioner then commenced this action, seeking to enjoin the suspension on the ground, *inter alia*, that the Secretary had no authority to recoup payments for services subsequently determined to have been unnecessary and not covered by the Act (Pet. Supp. App. 1a-2a). The district court granted petitioner's motion for summary judgment (Pet. Supp. App. 2a).

The court of appeals reversed and remanded.[2] Relying upon its decision in *Mount Sinai Hospital, supra*, the court held that the Medicare Act did not abrogate the Secretary's common-law right of recoupment (Pet. Supp. App. 4a-5a).

The decision of the court of appeals is correct and does not warrant further review. As we noted at pages 6-8 of our brief in opposition in *Mount Sinai Hospital*, the government has inherent authority to recover funds illegally paid; this authority is abrogated only were Congress clearly has manifested its intention to do so, and Congress did not manifest such an intention in the Medicare Act.

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[2]Since the district court granted summary judgment on petitioner's claim that the Secretary lacked authority to recoup payments and did not consider petitioner's alternative claim that recoupment denied him due process, the court of appeals remanded the case to the district court for its consideration of the latter claim (Pet. Supp. App. 7a). Accordingly, petitioner's contention before this Court that the recoupment denied him due process is not ripe for review.

Petitioner contends that, notwithstanding these arguments, the government has authority to recover only funds that have been obtained by fraud, and that the Secretary has never contended that petitioner's claims were fraudulent. It is established, however, that the government's authority and duty to recover funds extends also to funds paid erroneously. *Wisconsin Central Railroad Co.* v. *United States*, 164 U.S. 190;. *United States* v. *Barlow*, 132 U.S. 271;[3] *Heidt* v. *United States*, 56 F.2d 559, 560 (C.A.5), cetiorari denied, 287 U.S. 501.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]Petitioner contends that *United States* v. *Barlow*, *supra*, is inapplicable because it involved "fraudulently paid funds." In *Barlow*, however, this Court specifically stated that the existence of fraud was immaterial to the government's right to recoup the funds (132 U.S. at 281).

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